Supreme Court, U.S.
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In The

Supreme Court of the United States

James Bonvillain Sr.,
James Bonvillain Jr.,
Petitioners,

VS.

The United States,
The United States Small Business Administration,
Linda D. Anderson
Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

PRO SE

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69 pgs

QUESTIONS PRESENTED FOR REVIEW

Anderson, Employee of the Small Business Administration, would not allow banks and lending institutions to process and pay the Small Business Administration's lien on the Bonvillain's property. Anderson while acting in the scope of her duties accepted bids on the Bonvillain's property. The Small Business Administration signed documentation authorizing the documentation of the vessel from Former Owner, Tran, to James Bonvillain Jr. The Small Business Administration and Anderson's attempted to utilize the fact that Anderson and the Small Business Administration allowed the Bonvillain's extensions to pay the lien and refurbish the vessel. However, the extensions could not overcome their unwillingness to allow banks and lending institutions opportunity to process and pay the lien and refurbish the vessel in behalf of the Bonvillain's. The extensions only serve the purpose of justifying Anderson and the Small Business Administration's intentional wrongdoing and intentional negligence.

Can the Court hold Anderson personally liable for her intentional wrongdoing and intentional negligence that caused the Bonvillain's to suffer from breach of contract, breach of fiduciary duty, and constitutional violations of the fourth and fifth amendments?

Can the Bonvillain's recover, through the court, specific performance, damages, and restitution from the Small Business Administrator due to the breach of contract, breach of fiduciary duty and constitutional violations of the fourth and fifth amendments?

QUESTIONS PRESENTED FOR REVIEW

Are issues never litigated within court res judicata with civil rights complaints even though the merits and cause of action are the same as the civil rights complaints in a declaratory complaint?

Can the Bonvillain's seek damages from the wrongful acts of the Assistant U.S. Assistant Attorney Fred T. Hinrichs and the Small Business Attorney Allen Wells? Whom conspired with each other to obstruct justice by interfering with the Bonvillain's right to have legal representation. Also the Attorney's knowing of the Small Business Administration's and Anderson's wrongdoing and negligence. Rather than to allow the Bonvillain's to complete the processing of their business. Hinrichs and Wells chose to distort the facts and conceal evidence coupled with interfering with the Bonvillain's litigation.

Can the Court ignore the fact, that Anderson's Declaration sets forth specific facts in support of allegations essential to her claim, genuine issue of material fact was presented, and summary judgment was inappropriate?

CERTIFICATE OF INTERESTED PERSONS

JAMES BONVILLAIN, SR., AND
NUMBER:
JAMES BONVILLAIN, JR.
VERSUS
THE UNITED STATES OF AMERICA, ET AL

Plaintiffs certifies that the persons having an interest in the outcome of this case are those listed below:

1) James Bonvillain Sr. (plaintiff), 2) James Bonvillain Jr. (plaintiff)

Defendants-Appellee:

1) U.S. Attorney General: Mr. Ashcroft 2) U.S. Attorney: James Letten 3) Assistant U.S. Attorney: Fred T. Hinrichs 4) The U.S. Small Business Administrator 5) U.S. Small Business Administration employee: Linda D. Anderson 6) Small Business Attorney: Allen Wells 7) The U.S. Solicitor General

This certificate is made so that the Judges of this Court may evaluate possible disqualifications or render a Judgment.

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Background

James Bonvillain, Sr., and James Bonvillain, Jr., (Bonvillain's), discussed the availability of purchasing the Small Business Administration's, (SBA) mortgage of the F/V Captain Lloyd with SBA employee Linda D. Anderson. (Anderson). Anderson stated that she could not entertain any offers until former owner Loi Le Tran documented releasing his ownership of the vessel to the Bonvillain's. Anderson gave the Bonvillain's Loi Le Tran's phone number and home address instructing the Bonvillain's to obtain ownership from Tran then, "we can negotiate the SBA's lien." The Bonvillain's contacted Tran and bought Tran's ownership of the vessel. The Bonvillain's phoned Anderson informed Anderson of their purchase and faxed her a copy of the purchase agreement, which respected SBA's lien. Anderson then instructed the Bonvillain's to make a written offer. The Bonvillain's offered to purchase SBA's lien for $30,000. Anderson agreed to the amount and documented the Bonvillain's thirty days to pay the SBA with a cashier's check. The Bonvillain's immediately sought financing from Hibernia Bank and the Banks Vice President, Jerry Ledet. Ledet instructed the Bonvillain's to hire Accountant, Henry Toups, to prepare a SBA Loan to purchase the lien and refurbish the vessel. Toups advised the Bonvillain's to get all estimates to refurbish the vessel and to assist him by obtaining earnings of a vessel of the same magnitude. Ledet assisted in the process of preparing the loan package. Ledet also contacted Anderson of the SBA and informed Anderson of his intention to assist the Bonvillain's by lending the money to purchase SBA's lien and refurbish the vessel by obtaining a SBA loan. Hibernia Bank would assist with the lending process. SBA received the loan application process

and approved the loan with stipulated terms and conditions. The Bonvillain's met all terms and conditions stipulated by the SBA. Bonvillain, Jr. gave up his military career without processing his medical benefits. Bonvillain Jr. utilized Bonvillain Sr.'s terminal ill condition along with his Grandmother's terminally ill condition to receive a hardship discharge from the United States Army rather than process a medical discharge due to time constraints. Bonvillain Jr. separated from the Army, his wife and children, in order to start in business.

Anderson refused to allow Hibernia Bank to process the check for the SBA's lien on the vessel. Anderson stopped the approved loan guarantee made by the SBA to the Bonvillain's by not allowing Banks and Lending Institutions to process and pay the SBA's lien, breaching contract. In a declaration made by Anderson, senior officials conspired with her to sell the Bonvillain's vessel. Anderson and constituents decided to entertain bids on the vessel and sell the vessel to a competing bidder. The Bonvillain's frustrated by Anderson's interference consulted and hired Attorney, Richard Barker, (Barker), whom change the name of the vessel and documented the vessel reflecting James Bonvillain Jr. as owner, with authorization from the SBA. Barker also drew the original petition. District Court, Judge Barbier, dismissed Bonvillain I due to the Bonvillain's not seeking administrative relief prior to filing the suite. The merits of the case and issues were never litigated as a matter of law. No one can sue a federal agency without first seeking Administrative remedies. However with no discovery and no basis the court stated that given the amount of continues given to the Bonvillain's that Anderson did not violate the

Bonvillain's constitutional rights and found no reason to waiver Anderson's sovereign immunity.

In Bonvillain II the District Court, Judge Porteous, (App 3) found no civil rights violations and did not litigate the Breach of Contract, constitutional violations, or the breach of fiduciary duties and decided to dismiss the case with prejudice. The Bonvillain's through out litigation has hired over nine attorneys whom did not properly represent them after having communications with SBA Attorney, Allen Wells. Bonvillain's forced to represent themselves Pro Se constructed a complaint to the 5th Circuit Court of Appeals, Judges POLITZ, WIENER, and PARKER (App 1) to obtain justice. The Court of Appeals decided and favored with the defendants, even though the merits of the case were never litigated within court.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals (App. 1) was entered on January 25, 2002, This Court's jurisdiction rest on 28 U.S.C. 1254(1).

RULES INVOLVED

FTCA 28 U.S.C.A. 1346(a)(2) 1346(f), 2409; Federal Rules Civil Procedure Rule 12(b)(6) 28 U.S.C.A; Small Business Act 2[5], 2[5](b)(1), 15 U.S.C.A. 634, 634(B)(1);

CONSTITUTIONAL PROVISIONS

IV AMENDMENT (Searches and **Seizures**)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V AMENDMENT (Capital crimes; double jeopardy; self-incrimination; **due process; just compensation for property**)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.**

REASONS FOR GRANTING THE WRIT

The SBA, and employee Linda D. Anderson, entered into a contract with the Bonvillain's and stipulated various conditions within an approved loan guarantee which the Bonvillain's met. Anderson and constituents conspired together to sell the Bonvillain's property to a competing bidder. However, before approving the loan guarantee the Bonvillain's were never informed that they would have to compete to purchase lien on the vessel they purchased from former owner.

The Bonvillain's request the Court to consider District Court's factual findings, in considering factual attack under rule governing motions to dismiss for lack of subject matter jurisdiction, do not bind court in future proceedings, and res judicata effect of a 12(b)(1) motion is limited the jurisdictional issue. Review by this Court is necessary to correct a situation which, if left as is, will severely impair the

entire system of funding and financing of Government contracts-with attendant unwillingness (and financial inability) of contractors to undertake such investments and destroy the long acknowledged effectiveness of the disputes process. Neither contractors nor the Government agencies with whom they do business can live with a system where finality in contract matters is nowhere to be honored save in the courts.

Dismissal with prejudice before issue or claim has been decided in adversarial setting constitutes final judgment barring relitigation for purposes of claim preclusion **but not for issue preclusion.** Courts of Appeals have litigated such cases and have found different opinions than the 5th Circuit Court of Appeal. For instance, cases such as: Lopez v. Ward 681 F.Supp. 192 (S.D.N.Y. 1988) The Court found that:

> *Observing that the " 'crucial' factor in determining whether claims are 'the same' is the factual predicate underlying them," the court found that the facts underlying the two actions were substantially different. The first action involved a single discrete issue: the Dissemination of confidential customer information. The second action involved a course of conduct aimed at injuring Technicare's public reputation. Likewise, the evidence required to support the first and second actions was different. The first required proof of "the confidential nature of the information, how the information was obtained, and its dissemination."* ***The second turned on the motives and justification of the defendant in disseminating the information. That both claims overlapped in their factual allegations did not render them the same for res judicata.***

In *Harrison v. Edison Bros. Apparel Stores, Inc.* 724 F.Supp. 1185 (M.D.N.C. 1989) the court's decision supports the Bonvillain's view that the Bonvillain's civil rights claims are res judicata and not the other issues that were not litigated.

> *The court does not agree. In Lawlor v. Screen Services Corp., 349 U. S. 322, 75 S. Ct. 865, 99 L.Ed 1122 (1955), the Supreme Court held that a judgment dismissing a suit with prejudice constitutes an adjudication of the merits as effective as an order entered after trial, and bars a later suit between the parties on the same cause of action. But the Court went on to note that where the judgment is not accompanied by findings. The judgment does note bind the parties on any issue that might arise in connection with another course of action. Id. at 327, 75 S. Ct. at 868. Accordingly, the general rule is that "[w]hile 'the stipulation of dismissal with prejudice constitutes a final judgment for the purpose of res judicata (claim preclusion)[,] **[it does] not for the purpose of collateral estoppel (issue preclusion).**' "*

The Bonvillain's request the United States Supreme Court to consider *Harrison v. Edison Bros. Apparel Stores, Inc. supra* and other cases which supports the Federal question and justify why the Bonvillain's should receive damages, restitution and specific performance from the intentional wrongdoing and intentional negligence of Anderson and the SBA. Such other cases are as followed: *American Standard Life & Acc. Ins. V.U.R.L., Inc. 701F Supp.. 527. (MD. PA. 1988); Key 654, Danis Industries v .Federal Environmental Restore. 947 F. Supp.323 (SD. Ohio 1966);key 654, Harrison V Edison Bros. Appaares stores inc 724 F Supp. 1185 (M.D. N.C. 1989);key654, Home Builders Ass'n V City of Madison Miss. 143 F 3d 1006 (5th Cir. 1998);key 654, Interdigital*

Technology Corp. V. Okiamerica Inc. 886 F Supp 212 (ED Pa. 1994);key654, Lopez V. Ward 681 F Supp 192 (S.D.N.Y. 1988);key 654, Mason Tenders Local Union 59 V. Liuna 924 F. Supp. 528 (SDNY 1992);key654,

The 5th Circuit Court of Appeals contends that the civil rights complaint found res judicata also places the merits of the issues never litigated as res judicata and collateral estoppel. The afore-mention cases disputes the courts rulings and gives cause for the Supreme Court of the United States of America a federal question to answer. Does the denial of the civil rights claims bars the rest of the issues never litigated from litigation?

The Supreme Court of the United States is requested to consider the Court of Appeals decision based on the sufficiency of clear and convincing evidence, the facts, and the omission by SBA employee, Anderson. Declaration of Linda D. Anderson fully supports the allegations made by the Bonvillain's and raises genuine issue of material fact. However, the Court of Appeals for whatever reason failed to litigate Breach of Contract, Breach of Fiduciary Duty and moved to dismiss with prejudice all claims rather than only the civil rights claim the Court disagreed with. Other courts have very different views on the same issues. In *WESSELS, ARNORLD & HENDERSON v. NAT. MEDICAL WASTE 65 F.3*d 1427 (8th Cir. 1995) the court states:

"Court of Appeals reviews grant of summary judgment by considering all factual issues in light most favorable to nonmoving party and ***determining de novo whether there was no genuine issue of material fact*** *and moving party is entitled to judgment as a matter of law."*

The Bonvillain's have presented statements from banks and lending institutions that were willing to loan the Bonvillain's the money to pay the SBA lien and refurbish the vessel, the Captain Big Jim. Anderson, a federal employee

for the SBA, denied all lending institutions an opportunity to process and pay the lien and refurbish the vessel. Anderson admits, within declaration, that the SBA and self did not consider the Bonvillain's as owners even after authorizing the Bonvillain's to document the vessel in their name and change the name of the vessel from the Captain Lloyd to the Captain Big Jim. Anderson further denied Dryades National Savings Bank to pay the lien and refurbish the vessel after Anderson and the SBA allowed the vessel documentation change. Anderson and SBA contend that Lloyd Le Tran had given the vessel to Jessie Hays. Anderson nor the SBA has any supporting documentation of this transaction. Anderson and the SBA consulted with the Bonvillain's attorney, Richard Barker, whom documented the vessel with the SBA's authorization. The SBA and Anderson legal council contend that due to the fact their clients allowed the Bonvillain's to receive extensions and were not able to pay the lien, regardless of Anderson and the SBA denying lending institutions to process and pay the lien and refurbish the vessel. The Bonvillain's have provided the court with material fact in support of their claim.

According to *BECKETT v. AIR LINE PILOTS ASS'N* 59 F.3d 1276 (D.C. Cir. 1995)

> *On appeal from district court's grant of summary judgment, Court of Appeals must grant nonmovant the benefit of all reasonable evidentiary inferences that can be drawn in her favor and can uphold summary judgment* ***only where there is no genuine issue of material fact*** *and, viewing evidence in light most favorable to nonmovant, movant is entitled to prevail as a matter of law.*

The 5th Circuit Court of Appeals ruling has contrast with its own and other court rulings. This is demonstrated within other Circuit Courts of Appeals demonstrated by the

following cases: *Booker T. Washington Broadcasting Ser.* 234 F.3d 501 (11th Cir. 2000), *ROGERS v. Horsley* 39 F.3d 308 (11th Cir. 1991), *MASSY v. DEL LABRORATORIES, INC.* 118 f.3D 1568 (FED. CIR. 1997), *MIRANDA v. B7B CASH GROCERY STORE, INC* 975 F.2D 1518 (11TH CIR. 1992), *BARNETT v. U.S. AIR, INC.* 228 F.3D 1105 (9TH Cir. 2000), *WESSELS, ARNOLD & HENDERSON v. NAT. MEDICAL WASTE* 65 f. 3D 1427 (8TH CIR. 1995). The aforementioned case demonstrates vast difference between the Court of Appeals. The court should have allowed litigation concerning all the issues.

As a result of Anderson's and the SBA's Breach of Contract, Breach of Fiduciary Care, and the Constitutional violations Bonvillain Jr. Suffered general and special damages related to the unnecessary termination of and the loss of his military career including:

1) Past and future lost wages, fringe benefits, and impairment of earning capacity;
2) Past and future mental and emotional distress;
3) Past and future aggravation, annoyance and inconvenience;
4) Loss of enjoyment of life;
5) Separation of family.
6) Repossession of vehicle.

Plaintiffs James Bonvillain Sr. and James Bonvillain Jr. have suffered general and special damages related to the inability to close on the SBA guaranteed loan or the release of the SBA lien as follows:

1) The value of plaintiff's equity investments in the F/V Captain Big Jim of at least $105,000.
2) Lost income and earning capacity from the operation of the F/V Captain Big Jim;
3) Aggravation, annoyance and inconvenience;

4) Damage to their credit;
5) Increased expense of obtaining substitute financing.

The 5th Circuits rule conflicts with the decisions of every other Court of Appeal that has addressed the issues. Cases such as *COLEMAN v. HOUSTON INDEPENDENT SCHOOL DIST.* 113 f.3D 528, (5th Cir. 1997); *SCHULTEA v. WOOD* 47 F.3d 1427,1431, (5th Cir. 1995); *GARCIA v. UNITED STATES* 666 f.2D 962, (1982); *BIVENS v. SIX UNKNOWN NAMED FEDERAL AGENTS OF THE FEDERAL BUREAU OF NARCOTICS* 403 U.S. 388, 91 S.C.T. 1999, 29 L.Ed. 2D 619 (1971). The Court of Appeals found that it was fair to hold a Federal official, who knowing violated the constitutional rights of the people, and are responsible for intentional wrong doing and intentional negligence. The Bonvillain's should have had an opportunity to have the issues of Breach of Contract, Breach of Fiduciary Care, and the Constitutional violations not litigated within the judicial system litigated. The Bonvillain's have supported allegations with a monument of clear and convincing evidence and an omission by Anderson, that should have allowed them to recover damages, specific performance, and restitution from the defendants.

The 5th Circuit Court of Appeals decision if accepted and no relief given would set new unacceptable standards and lose public trust in Government Agencies and the Judicial system. Within *RODGERS v. HORSLEY* 39 F.3d 310 (11th Cir. 1994) states:

'"Once the qualified immunity defense is raised, the plaintiff bears the burden of showing that the federal "rights" allegedly violated were "clearly established." BARTS V. JOYNER, 865 f.2D 1187,1190 (11TH Cir. 1989) (citing MITCHELL v. FORSYTH, 472 U.S. 511, 527-528, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985).

The Bonvillain's have demonstrated the constitutional violations of the 4th Amendment in that Anderson attempted to illegally seize the Bonvillain's property without obtaining seizure through the court system. The 5th amendment the attempt of taking of the Bonvillain's property without due process of the law. Also under the 5th amendment government interference with the Bonvillain's right to refurbish their property. Anderson after entering into a contract with the Bonvillain's and after the SBA and Anderson allowed the documentation of the Vessel to change owners from Loi Le Tran to Bonvillain Jr. accepted bids on the Bonvillain's property. Every reasonable government official in a similar position would have known that Anderson's acts were unlawful. The Bonvillain's were deprived of their property, quality of life and liberty without due process of law. *RODGERS v. HORSLEY supra* cites, *For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 639-640, 107 S.Ct. 3034,3039,97 L.Ed.2d 523 (1987) (emphasis added). "[I]n the light of pre-existing law the unlawfulness must be apparent."*

Anderson did not have misunderstanding in recognizing the Bonvillain's owned the vessel. The SBA signed the necessary paperwork for the Bonvillain's to document the vessel into Bonvillain Jr's name; Also no documentation was provided by Anderson or the SBA to sustain allegations that former owner Tran had given the vessel to Hays. However, the Bonvillain's obtain documentation from Tran stating that he never gave the vessel to Hays. Anderson known or should have known that the documentation of the vessel with the United States Coast

Guard served as legitimate documentation that clearly showed proper ownership. Anderson's and the SBA's attempted to sell the Bonvillain's vessel after the documentation proves that the defendants knew their actions were illegal and fraud was committed. This clearly demonstrates the knowledge of the SBA and Anderson. The SBA and Anderson were violating constitutional rights protected by the 4th and 5th amendments.

As stated within *Lopez v. Ward supra* the Bonvillain's should be afforded every reasonable opportunity to demonstrate that they have a valid claim.

> *In determining this issue, the court must be mindful that "a pro se litigant should be afforded every reasonable opportunity to demonstrate that he has a valid claim." Satchell v. Dilworth, 745 f.2d 781,785 (2d Cir. 1984) The plaintiffs in Bridge C.A.T. Scan Associates v. Ohio-Nuclear Inc., 608 F.Supp. 1187 (S.D.N.Y. 1985) and National Ass'n of Pharmaceutical Mfrs. V. Department of Health, 586 F.Supp. 740, 745 (S.D.N.Y. 1984) (quoting Herendeen v. Champion International Corp., 525 F.2dn130, 134 (2d Cir. 1975)) were permitted to assert claims which undeniably had some connection to claims asserted in earlier lawsuits although, unlike Lopez, those plaintiffs were represented by counsel and were in a much better position than Lopez to assert all their claims in the earlier actions. Lopez has made every effort to comply with an often bewildering array of procedural and substantive rules.*

The Bonvillain's contracted and hired twelve attorneys to represent them. The attorneys seemed interested in obtaining justice until they contacted the defense attorneys. The attorneys did nothing but signed on the case and tried to

allow the defense an opportunity to obtain summary judgement.

The Bonvillain's argue that Anderson's and the SBA's action in violation of the Bonvillain's constitutional rights under the 4th and 5th amendments are actionable under the FTCA 28 U.S.C.A. 1346(B), 2671 et seq. The Bonvillain's sought to have the sovereign immunity waived for Anderson and the SBA. The Court of Appeals on motion of its own, require plaintiff to reply to that defense in detail; by definition, reply must be tailored to assertion of qualified immunity and fairly engage its allegations. Federal Rules Civil Procedure Rule 7, 8(A), 28 U.S.C.A. The Bonvillain's have supported their claim with sufficient precision and factual specificity to raise a genuine issue as to illegality of Anderson's conduct at time of alleged acts. However, the Court of Appeals supports the trial court conclusion that the complaints against the Government were intentional in nature and, thus, outside the scope of the FTCA waiver provisions. However, according to *CLAXTON v. SMALL BUSINESS ADMIN. OF U.S. GOVERN.* 525 F.Supp. 779 (1981)

> *Where resolution of issue whether binding contract to sell land ever existed between Small Business Administration and purchaser turned on SBA's proffered affidavit, which purported to show that no authorized official approved contract of sale, purchaser, as nonmoving,* ***party entitled to at least ten days notice that SBA's motion to dismiss was being converted to motion for summary judgment in order to have adequate opportunity to show whether there were genuine fact issues that precluded summary judgment.28 U.S.C.A. 1346(F), 2409a; Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.***

The Bonvillain's did have title to vessel during Anderson's refusal to allow banks and lending institutions to process and pay the SBA lien in behalf of the Bonvillain's. The Bonvillain's also obtained an approved loan guarantee, (contract) outlining the terms and condition. Anderson prepared a Declaration stating the fact that she knew of the documentation of the vessel. Anderson also states that after the documentation she refuse to allow banks and lending institutions to process and pay the SBA lien due to the SBA and Anderson's intention to deprive the Bonviilain's and sell the vessel to a competing bidder. According to *Claxton v. Small Business Admin. Of U.S. Government supra* The Bonvillain's were entitled to sue the Small Business Administration in any district court without amount in controversy. Small Business Act 2[5], 2[5](b)(1), 15 U.S.C.A. 634, 634(B)(1).

The Bonvillain's also point out 5th Circuit Court findings with regards to Breach of Contract pertaining to the Small Business Administration. The following court decision contradicts the decision made in behalf of the Bonvillain's. Cited within *Claxton v. Small Business Admin. Of U.S. Government supra*:

> *The defendant SBA does not specify the type of cause of action in tort it claims plaintiff is pursuing in this case. Of course, a cause of action for tortious interference with contract rights is excepted from the FTCA, 28 U.S.C. 2680(h), and therefore is not actionable even if plaintiff had timely filed an administrative claim. A separate tort theory may be available where the action of Defendant not only violates a contractual obligation but* ***also violates a duty owed to plaintiff independent of the contract.*** *See Orkin Exterminating Co., Inc. v. Stevens, 130*

Ga.App. 363, 365, 203 S.E.2d 587 (1973). Yet, not all duties arising from contract, if breached, may also serve basis for a cause of action in tort. As stated by the Georgia Court of Appeals:

[W]here defendant's negligence ends merely in nonperformance of the contract and where defendant is not under any recognized duty to act apart from contract, the courts generally still see no duty to act affirmatively except the duty based on-and limited by-defendant's consent. In those circumstances, an action in tort may not be maintained for what is a mere breach through non-action or through ineffective performance (which is the same thing) of a contract duty-the duty must arise independent of contract to constitute a tort.

Id. at 365, 203 S.E.2d 587 (citations omitted); see Tate v. Aetna Casualty &Surety co., 149 Ga.App. 123, 124-25, 253 S.E.2d 775 (1979).

In this case, the "gravemen" of plaintiff's complaint is that the SBA did not perform an affirmative duty, which arose solely on the basis of the alleged contract between plaintiff and the SBA. The complaint does not allege that the SBA had any duties independent of the contract. Thus, the cause of action must be limited to one sounding in contract.

Ordinarily, three alternative remedies are available for breach of contract: specific performance, restitution, and damages. See PMS Construction Colk Inc. v. DeKalb County, 243 Ga. 870, 257 S.E.2d 285 (1979). Here, plaintiff seeks specific performance and damages. The relationship between these remedies was summarized by the Georgia Supreme Court in Loewus v. Eskridge & Downing, Inc., 175 Ga. 456, 165 S.E. 576 (9132):

JURISDICTION

The Bonvillain's have presented The United States Supreme Court with the facts and laws associated with their case. The Trial Court and the 5th Circuit Court of Appeals ignored the facts and evidence to sustain
The Bonvillain's from acquiring Specific Performance, Restitution, and Damages for their injuries. The Bonvillain's do not wish to pursue civil rights violations, but do intend on receiving justice for the intentional wrongdoing and intentional negligence of Anderson and the Small Business Administration. Anderson and the Small Business Administration breached contract, breached fiduciary duty, and violated the Bonvillain's constitutional rights. The 5th Circuit Court of Appeals has not allowed the facts and clear convincing evidence to be litigated within the Court. The Court of Appeals states that Anderson's actions were intentional in nature and outside the FTCA waiver provisions. However, the court does not recognize their own view in *Claxton v. the United States Small Business Administration*. The court did not give the Bonvillain's notice it was considering dismissing and converting the defendant's motion for summary judgement. The Bonvillain's would have given reasons supported in law as to why their claim should not be dismiss.

It would disrupt judicial proceedings to allow the 5th Circuit Court of Appeals to dismiss this case with the vast different opinions of all other Circuit Courts. It would also lose public trust in the United States Government for a Federal employee to intentionally injure its citizens. Justice should and must prevail. The court should not to send the wrong message to Federal agents that they can intentionally injure citizens and there would be no punitive action to account for.

If the aforementioned does not satisfy this honorable court the Bonvillain's refer the court to evaluate *CLAXTON V. SMALL BUSINESS ADMIN. OF U.S. GOVERN. Supra.* In accordance with the 5th Circuit Court the Tucker Act provides the requisite consent and jurisdictional basis for such actions.

> *Since the complaint sounds in contract, federal court jurisdiction over plaintiff's claim must find support in a governmental consent to suit other than the FTCA. Ordinarily, the Tucker Act provides the requisite consent and jurisdictional basis for such actions. 28 U.S.C. 1346(A)(2), 1491-1507. As recently* ***commented by the Fifth Circuit:***
>
> *When an action against the United States or its agencies is "founded. . .upon any express or implied contract with the United States" or "for liquidated or unliquidated damages in cases not sounding in tort," . . . [section 1346(a)(2)] is normally relied upon, for it operates both as a waiver of sovereign immunity and a grant of jurisdiction. A.L. Rowan & Son v. Department of Housing and Urban Development, 611 F.2d 997, 999 (5th Cir. 1980). Yet the Tucker Act, federal district court jurisdiction is limited; the court of claims has exclusive jurisdiction to determine claims against the United States which exceed $10,000.00 Id. See also 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure 3657, at 220 (1976)("The contract that plaintiff is relying upon [in a Tucker Act Claim] must be recognized specifically as a government contract on which the United States is liable.") Thus in this action, since plaintiff's claim exceeds $10,000.00, exclusive jurisdiction would vest in the court of claims.*

With the elimination of the Tucker Act and the FTCA, as available statutory avenues for the prosecution of plaintiff's claim, the Court must turn to two separate statutes which, according to plaintiff, constitute a germane waiver of sovereign immunity and confer jurisdiction over plaintiff's cause of action. First, section 1346(f) of the Judicial Code accords federal jurisdiction for actions to "quiet title" in real estate in which the United States claims an interest. See C. Wright, A. Miller, & Cooper, Supra, 3656, at 209-10. The specific waiver of sovereign immunity for such actions and the applicable procedure is prescribed in 28 U.S.C. 2409a. Id. at 206; see California v. Arizona, 440 U.S. 59, 63-65, 99 S.Ct. 919, 922-23, 59 L.ED.2d 144 (1975). Second, the "sue and be sued" clause contained in 15 U.S.C. 634(b)(1) constitutes a limited waiver of sovereign immunity for actions against the SBA. The issue presented is whether these statutes authorize suit against the SBA for alleged breach of contract and sanction relief in the form of monetary damages and specific performance.

28 U.S.C. 1346(f), 2409a

[12] Section 2409a was enacted "to allow the United States to be made a party in actions in district courts to quiet title to lands in which the government claims an interest." Fulcher v. United States, 632 F.2d 278, 282-83 (4th Cir. 1980)(en banc); see Cummings v. United States, 648 F.2d 289 (5th Cir. 1981); Buchler v. United States, 384F.Supp. 709 (E.D. Cal.1974). The term "quiet title," as used in the jurisdictional provision, section 1346(f) and the substantive provision, section 2409a, has been given a broader

meaning than the common law remedy by quia timet. In prater v. United States, 612 F.2d157,159 (5th Cir.), aff'd on rehearing, 618 F.2d 263 (5th Cir. 1980), the Fifth Circuit concluded that "[s]ection 2409a, which was enacted contemporaneously with section 1346(f), waives sovereign immunity in all suits to 'adjudicate a disputed title to real property[,]', . . actions which may not have been properly labeled as actions to quiet at common law." Yet, to come within the class of beneficiaries envisioned by section 2409a, plaintiff must still "have title or color of title to land in which the United States also claims an interest." Tudor v. Members of Arkansas State Parks, 83 F.R.D. 165, 172 (E.D.Ark.1979) (emphasis added). This view of the section 2409a class of plaintiffs expressed by the district court in Tudor is accord with Prater in which the Fifth Circuit, on rehearing, emphasized that the plaintiff "asserted equitable title to the realty, under Georgia trust law."618 F.2d at 263.

[13] In this case, taking the allegations of plaintiff's as true, see Williamson, supra, it appears that the parties entered into a contract for the sale of land. The plaintiff paid 10% earnest money and later tendered the full purchase price. Under such an executory contract for sale of realty, the purchaser has a beneficial interest in the land, which may be sold or assigned. See Waldrop v. Bettis, 223 Ga. 715,719,157 S.E.2d 870 (1967); Walker v. General Insurance Co., 214 Ga. 758, 761, 107 S.E.2d 836 (1959). Such an interest in realty is akin to the jurisdiction-generating interest approved in Prater. See 612F.2d at 159, 160 (plaintiff claimed equitable title in land under a statutory implied trust, Ga.Code

108-106). Accordingly, on the basis of prater, plaintiff meets the threshold jurisdictional requirements of 28 U.S.C. 1346(f).

[14] Yet, even conceding that the court has jurisdiction to entertain plaintiff's substantive claim under 28 U.S.C. 2409a, defendant SBA maintains that no contract binding on the SBA ever existed between the parties. Briefly stated, the SBA argues that under federal regulations, only certain SBA officials may approve a contract for the sale of SBA realty. By affidavit, the SBA purports to show that no authorized official approved the contract of sale in this case, and thus, under the well settled principle that the federal government may not be bound by its agents acting beyond their actual authority, the SBA contends that the contract is not valid.

It is clear that resolution of this issue turns on the SBA's proffered affidavit. It is equally clear, however, that "a district court must treat a 12 (b)(6) motion for failure to state a claim as a motion for summary judgment where the trial court considers matters outside the pleadings." Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1158 (5th Cir. 1981). Moreover, the nonmoving party is entitled to at least ten days notice that a Rule 12(b)(6) motion is being converted to a motion for summary judgment. Hickey v. Arkla Industries, Inc., 615F.2d 239, 240 (5th Cir. 1980); Oaxaca v. Roscoe, 641 F.2d 386, 391-92 (5th Cir. 1981). Accordingly, in order to afford plaintiff an adequate opportunity to develop whether genuine fact issues exist on this question, ruling on this aspect of defendant's motion is deferred for at least ten days; provided, however, that the motion is then reasserted by defendant SBA.

15 U.S.C. 634(b)(1)

As a second statutory consent to suit, plaintiff argues that his action is cognizable under 15 U.S.C. 634(B)(1), which provides: [t]he Administrator [of the SBA] may-. . . .

sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be used against the Administrator or his property.

Courts view this statue as a limited waiver of sovereign immunity for the SBA, see, e. g. Romeo v. United States, 462F.2d 1036, 1037 (5th Cir. 1972), cert. Denied, 410 U.S. 928, 93 S.Ct. 1361, 35 L.Ed.2d 589 (1973), and as a grant of federal district court jurisdiction to hear such suits. See Expedient Services, Inc. V. Weaver, 614 F.2d 56,57 (5th Cir. 1980).

A review of the case law construing section 634(b)(1) reveals the following: (1) even though the statute expressly authorizes suit against the adminstrator, "the fact that the named party was the administration rather than the Administrator [is] of no consequence;" Mar v. Kleppe, 520 F.2d 867, 870 (10th Cir. 1975); (2) section 634 confers federal court jurisdiction over claims for monetary damages against the SBA and such claims need not be brought in the court of claims when the amount in controversy exceeds $10,000.00; id. at 970-71; (3) declaratory relief is an available remedy under section 634; and (4) while claims for monetary damages and

declaratory relief are actionable, section534 specifically precludes injunctive relief, which includes relief, "in the nature of specific performance." Romeo v. United States, 462 F.2d at 1038.

[15, 16] Applying these principles to the instant case, it is apparent that plaintiff's claim for monetary damages stemming from the SBA's alleged breach of contract is actionable under section 634 and that the Court has jurisdiction to hear such a claim. As a general rule, such damages for vendor breach of an executory contract to convey equals the loss of the bargain to the purchaser, that is the difference between the contract price and the value of the land, plus any consequential damages. Thus, if plaintiff in this case proves liability on the part of the SBA for total breach of an executory contract to convey realty, recoverable damages would be the difference between the value of the land, as calculated as of the date of breach, and the contract price plus any proved consequential damages.

[17] Yet, "injunctive relief," which the Fifth Circuit has extended to specific performance, see Romeo supra, is unavailable under section 634. Such a statutory restriction on available remedies, however, does not compel dismissal of plaintiff's entire claim for lack of subject matter jurisdiction. As Judge Tate commented in Weaver, supra: "This restriction appears to be more in the nature of a limitation on the waiver of sovereign immunity than a restriction of the court's jurisdiction." 614 F.2d at 58. Thus, while "injunctive relief" against the SBA is clearly unavailable under the "sue and be

sued" immunity waiver of section 634, this is not jurisdictionally fatal to plaintiff's action where other relief is sought.

[18] As an additional matter, the Court notes that, although part of plaintiff's complaint seeks relief in the form of an injunction, the Court may nevertheless, where appropriate, construe the request as one for declaratory relief thereby bringing the claim within the ambit of section 634. See Mar v. Kleppe, 520 F.2d at 869. Furthermore, a review of Prater supra, reveals that the Fifth Circuit approved federal court jurisdiction pursuant to 28U.S.C. 1346(f) over a claim for the conveyance of realty owned by the United States. Thus, Prater seems to imply that section 1346(f) confers jurisdiction over a claim against the United States for relief in the nature of specific performance. Whether the Court in this action may order the SBA to convey realty to the plaintiff under the provisions of 28 U.S.C. 1346(f), 2409a, or 15 U.S.C. 634, is a matter jurisdiction issue raised by the present motion is decided in favor of plaintiff.

CONCLUSION

The Bonvillain's have demonstrated by specificity in substantive law the errors of the 5th Circuit Court of Appeals and the District Court decision within Bonvillain II. Judge Porteous states that Judge Barbier dismissed with prejudice all claims against Linda D. Anderson and the United States and its agency the Small Business Administrator. However the fact is that Judge Barbier stated that due to the Bonvillain's not filing opposition to the defendant's motion to dismiss that he made a decision on the merits. Judge Barbier then went further and stated due to the

Bonvillain' s not seeking administrative remedies that he ordered **all complaints against Anderson, the United States and the SBA Dismissed Without Prejudice.** Thus leaving the Bonvillain's opportunity to litigate the wrongful acts of Anderson and employer the Small Business Administration. The 5th Circuit cannot place the Bonvillain's claims as res judicata due to one Court's decision to dismiss with prejudice.

The Bonvillain's would also request this Court to consider Anderson's Declaration. In accordance with *COLEMAN V. HOUSTON INDEPENDENT SCHOOL DIST.*, 113 f.3D 529 (5TH Cir. 1997). Since Anderson set forth facts in support of allegations essential to her claim, genuine issue of material fact is presented, and summary judgment is inappropriate. (objecting 12(b)(1) standing) Quoted below:

> *On review of denial of motion for summary judgment, Court of Appeals views facts in light most favorable to nonmovant and draws all reasonable inferences in nonmovant's favor; if nonmovant sets forth specific facts in support of allegations essential to her claim, genuine issue of material fact is presented, and summary judgment is inappropriate.*
>
> Anderson's Declaration states, (on page 3 item 13) *"On or about August 4, 1997, the Louisiana District Office received a letter from James Bonvillain (which did not specify "Jr." or "Sr."), offering $30,000 for the release of SBA's first lien on the Captain Lloyd, indicating that Le Tran "signed his interest in the Captain Lloyd" over to James Bonvillain (again, not indicating "Jr." or "Sr."), and enclosing an estimate for replacement of parts on the Captain Lloyd. While this letter did not indicate "Jr." or*

"Sr.", it is my understanding that during this time period I was dealing with James Bonvillain Sr."

Anderson admits corresponding with a bidder to sell the Captain Lloyd to. Anderson did not honor the Bonvillain's ownership of the vessel and corresponded with another party to sell the Bonvillain's vessel too. Cited within Anderson's Declaration page 4 items 19, 20, 21, 22. Also within Anderson's Declaration, Anderson admits that during this time the Bonvillain's were working with Hibernia National Bank processing a SBA guaranteed loan for the purpose of refurbishing the vessel and paying off the $30,000 lien. She entertained bids to sell the Bonvillain's property.

Anderson frustrated the Bonvillain's loan with Hibernia National Bank by telling the Bank's Vice President, Jerry Ledet, that she had a second potential buyer she was more interested in selling the vessel to.

The Bonvillain's then sought financing through Bank One to pay the $30,000 lien. Bank One approved this loan, but Anderson would not allow the Bank to process the check stating that she will sell the vessel to a competing bidder.

Anderson then approved an extension to allow the Bonvillain's time to pay the lien. However, Anderson would not allow any bank or lending institution to process and pay the lien or process and refurbish the vessel.

Page 5 item 25 of Anderson's Declaration makes it very clear that the Bonvillain's owned the vessel. Anderson still would not allow any lending institutions or banks process and pay the lien or refurbish the vessel.

Anderson knowingly violated the Bonvillain's 4th and 5th Amendment rights under the Constitution. Demonstrated in Anderson's Declaration on page 3 item 11. Anderson states, "After locating the Captain Lloyd, the Louisiana District Office determined that the Captain Lloyd was not

worth foreclosing, and decided to attempt to sell SBA's interest in the Captain Lloyd." Anderson knew or should have known without seizing the vessel the only option the Government had was to accept a smaller pay off from the owner or start the proper procedure to obtain ownership prior to attempting to sell property the SBA did not own.

Anderson admitted to trying to sell the Bonvillain's property without due process of law. Anderson also verify that she would not allow banks and lending institutions to process and pay the lien or refurbish the vessel. Anderson states that she gave the Bonvillain's extensions to meet their obligations but if this Court review the dates of Anderson's extensions with the dates from the lending institutions it would be clear that Anderson would frustrate a potential lender. Anderson would then offer a short extension. Once, the Bonvillain's potential lenders would try to receive an extension that would actually be beneficial Anderson would not allow extensions.

The 5th Circuit Court of Appeals has erred in that Bonvillain I even-though litigated upon the merits was **DISMISS WITHOUT PREJUDICE.** Bonvillain II was in fact was **DISMISSED WITH PREJUDICE.** This leaves the Bonvillain's an opportunity for further litigate claims and effectively demonstrates the Court's Affirmation of the res judicata, 12 (b)(1), standing is in err. The Federal Tort Claims Act, claims within the Bonvillain's Complaints should not be dismiss for failure to state a claim under Rule 12(b)(6) This Writ has appropriately addressed this issue from caption **Jurisdiction** until conclusion.

The Bonvillain's submitted a **REQUEST FOR WAIVER OF SOVEREIGN IMMUNITY FOR LINDA D. ANDERSON AND THE SMALL BUSINESS ADMINISTRATOR.** The request for waiver of sovereign for Anderson and the SBA was submitted to the 5th Circuit

Court of Appeals along with the request for waiver of sovereign immunity for U.S. Assistant Attorney, Fred T. Hinrichs and SBA Attorney, Allen Wells.

The Attorney's knew the actions of Anderson and the SBA were wrong and neglectful. The Attorney's rather than properly representing the United States and citizens chose to deny the Bonvillain's of their property and defend the wrongdoing of Anderson and the SBA. However, apparent throughout the Bonvillain's litigation the Attorney's conspired with Bonvillain's former council in attempts to distort the facts and conceal crucial evidence. The Attorney's attempted to obstruct justice and should be held responsible for their actions in accordance with law. These allegations are apparent throughout the Bonvillain's litigation, for example if the Attorney's would have instructed the SBA to allow the Bonvillain's to complete the process of refurbishing the vessel and allowed the banks and lending institution to process and pay the lien. Litigation would not have been necessary.

The United States and our elected officials have worked hard to instill within its citizens to trust the Government. Starting with kindergarten the Pledge of Allegiance is taught. Public officials constantly work to keep our Government trusted by its citizens and the world. James Bonvillain Jr. believed in and trusted our Government. Bonvillain Jr. served within the United States Army to protect the United States Constitution and our way of life. Bonvillain Jr. was injured while serving in the Army. Knowing he was not able to sustain his active duty status Bonvillain Jr. opted to start a business to maintain financial obligations and provide for his family. The facts are that Bonvillain Jr., as many, American's trust the Government and believed once the loan guarantee was approved that he

would be able to continue to provide for family and self. Bonvillain Jr.'s dedication to this Government should not be honored by a wrongful agency and its employee taking away his business, life, and dreams. To Bonvillain Jr., Anderson and the SBA's wrongdoing and negligence is equivalent to the bombing on September 11, 2001, which also destroyed lives.

The 5th Circuit Court conclusion that Anderson's intentional wrongdoing and negligence was intentional in nature and, thus outside the scope of the FTCA waiver provisions. However, Anderson's wrongdoing and negligence occurred while working on the job representing the SBA. Anderson's violation of the Bonvillain's fiduciary duty constitutional rights brings litigation within the FTCA. Also making the SBA responsible under respondeat superior.

Based on the above cited arguments, procedural and substantive laws, "the rules", the error of the 5th Circuit Court of Appeals and clear and convincing evidence which clearly demonstrates the intentional wrongdoing and negligence of Anderson and employer the Small Business Administrator. The Bonvillain's prays that this Writ of Certiorari to review the judgment of the United States Court of Appeals for the 5th Circuit be granted.

Respectfully submitted.

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James Bonvillain Jr.
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Dated: 13 June, 2002

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JAMES BONVILLAIN SR., and
JAMES BONVILLAIN JR.

Plaintiffs-Appellants

Versus

THE UNITED STATES OF AMERICA;
SMALL BUSINESS ADMINISTRATION;
LINDA D. ANDERSON,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
NO. 01-30770
January 25, 2002

Before POLITZ, WIENER, and PARKER, Circuit Judges.
PER CURIAM:

James Bonvillain Sr. and James Bonvillain Jr. appeal the district court's dismissal with prejudice of their civil action and entry of judgment on behalf of the Government. On appeal, they contend that the district court erred in dismissing, on *res judicata* basis, their civil rights and constitutional complaints under rule 12(b)(1). They also filed two motions with this court. The first is a request for the

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Pursuant to 5TH Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH Cir. R. 47.5.4

United States and its agencies to cease alleged surveillance activities of the Bonvillains and alleged interference with their litigation. The second motion is a request for waivers of sovereign immunity, in order that they may pursue claims of intentional wrongdoing and negligence against two Government attorneys. In response to these motions, the Government has filed a motion in opposition and a request for sanctions.

A rule 12(b)(1) dismissal is reviewed under a *de novo* standard.1 Similarly, whether a claim is barred by *res judicata* is subject to a *de novo* review.2 *Res judicata* applies if: (1) the judgment in the first action was rendered by a court of competent jurisdiction; (2) the first action concluded with a final judgment on the merits; (3) the parties to both actions are identical or at least in privity; and (4) the same claim or cause of action is involved in both actions.3

The record of the first lawsuit reflects that the same civil rights and constitutional claims advanced in the first action were dismissed with prejudice. Further, all of the requirements for the preclusive effect of *res judicata* were satisfied. Accordingly, the district court correctly determined that the identical claims raised were barred by *res judicata.*

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1 Robinson v. TCI/US West Communications, Inc., 117 F.3d 900, 904 (5th Cir. 1997).

2 Schmueser v. Burkburnett Bank, 937 F.2d 1025, 1031 (5th Cir. 1991).

3 Ellis v. Amex Life Ins. Co., 211 F.3d 935, 937 (5th Cir. 2000).

The Bonvillains also maintain that the district court Erred in dismissing their claims under the Federal Tort Claims Act for failure to state a claim under Rule 12(b)(6) are reviewed *de novo.* 4 The United States and its agencies are immune from suit except upon waiver of sovereign immunity. 5 A review of the Bonvillains complaints fully supports the trial court's conclusion that the nature of their complaints against the Government were intentional in nature and, thus, outside the scope of the FTCA waiver provisions. 6

The district court's dismissal of all of the Bonvillains' complaints with prejudice is AFFIRMED. The motions filed by the Bonvillains are DENIED, as is the Government's motion for sanctions.

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4 Shipp v. McMahon, 234 F.3d 907, 911 (5th Cir. 2000).
5 FDIC V. MEYER, 510 U.S. 471, 475 (1994).
6 28 U.S.C. 1346(b), 2675; Gaudet V. United States, 517 F.2d 1034, 1035 (5th Cir. 1975).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES BONVILLAIN, SR. ET AL	CIVIL ACTION
VERSUS	NO. 00-3001
UNITED STATES OF AMERICA, ET AL	SECTION T (1)

JUDGMENT

The Court has granted the Defendants' Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment entered in favor of the Defendants, the United States of America and Linda D. Anderson, and against the Plaintiffs, James Bonvillain, Sr. and James Bonvillain, Jr., dismissing all of the Plaintiffs' claims **WITH PREJUDICE.**

New Orleans, Louisiana, this 11th day of June, 2001.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES BONVILLAIN, SR., ET AL	CIVIL ACTION
VERSUS	NO. 00-3001
UNITED STATES OF AMERICA, ET AL	SECTION T (1)

Before this Court is a Motion to Dismiss or, Alternatively, Motion for Summary Judgment filed by the United States of America on behalf of its agency, the U.S. Small Business Administration (SBA), and the SBA's employee, Linda D. Anderson (Anderson). The parties waived oral argument, and the matter was submitted on the briefs only. The Court, having considered the memoranda filed, the evidence submitted, the law and applicable jurisprudence, is fully advised in the premises and ready to rule.

ORDER AND REASONS

I. Background

On July 31, 1997, James Bonvillain, Sr., and James Bonvillain, Jr., ("Bonvillains") purchased the F/V Captain Lloyd, a vessel that the Bonvillains had hoped to use to start a fishing business. This vessel was subject to an outstanding Preferred Ship Mortgage held by the United States Small Business Administration in the amount of $118,000. The SBA, through its agent Linda Anderson, agreed to release its lien to the Bonvillains for $30,000. To satisfy the lien and obtain capital to start their business, the Bonvillains negotiated with Hibernia Bank (Hibernia) through its vice

president, Jerry Ledet (Ledet), to apply for an SBA guaranteed loan in the amount of $150,000. James Bonvillain Sr. also applied for a separate home equity loan for an additional $40,000. These loans, coupled with Bonvillain, Sr.'s infusion of $10,000 cash, were to give the Bonvillain's $200,000 to release the lien and refurbish the boat.

By letter dated November 21, 1997, the SBA notified James Bonvillain, Jr. that it would guarantee 75% of the requested $150,000 loan subject to six conditions: (1) He would provide a current financial statement from a CPA; (2) His financial condition would not adversely change prior to loan disbursement; (3) He would need to provide a Tax I.D. number; (4) He would need to provide a copy of a Form DD214 reflecting an Honorable Discharge from military service; (5) He would provide evidence that not less than $50,000 had been injected into the business as equity capital; and (6) He would provide a marine survey indicating that the value of F/V Captain Lloyd is at least $180,000.

The Bonvillains then met with Hibernia Bank representative Ledet to discuss and finalize the loan agreement. At this meeting, the Bonvillains informed Ledet that items one, two, three, and six were easily obtainable. Item four was only a matter of Bonvillain, Jr.'s formally applying for the discharge. To satisfy item number five, the $50,000 cash influx into the business, Bonvillain, Sr. and Ledet agreed that Hibernia would extend him a separate loan for $40,000 that would be combined with $10,000 of his own savings. Pursuant to this understanding, Bonvillain, Jr. resigned form the military, where he gad served twelve years and had attained the rank of Staff Sergeant. At the time of his resignation, Bonvillain, Jr. claims he earned approximately $48,000 per year in salary and benefits.

On January 23, 1998, Hibernia notified Bonvillain, Sr. that it had refused the application for the mortgage of

$40,000. Without the $40,000mortgage, Bonvillain, Jr. was not able to satisfy the $50,000 cash infusion requirement for the SBA guarantee of the $150,000 loan. In seeking alternatives to raise the $40,000, Plaintiffs received many extensions of the deadlines to pay the $30,000 required to secure the release of the SBA's lien on the Captain Lloyd and of the closing date for the $150,000 loan guarantee from the SBA. Extensions were granted until June 11, 1998. The Plaintiffs sought loans from two lending institutions, Dryades Savings Bank (Dryades) and America's Mortgage Resource (America's), in attempts to raise the necessary funds.

On May 26, 1998, Anderson spoke with representative from Hibernia, who informed her that Bonvillain, Jr. had not presented the required cash injection, and, as result, the loan had lapsed on April 21, 1998. This date had been Hibernia's extended deadline for the initial disbursement of loan funds as per the Authorization and Loan Agreement. On June 2, 1998, the SBA received an letter from Dryades, dated June 1,1998, indicating that Dryades had received a n application from Bonvillain, Jr. for a loan in the amount of $30,000. In this letter, Dryades indicated that its review of Bonvillain's loan application would be completed on June 20, 1998; therefore, Dryades requested an extension of the SBA's deadline to June 20, 1998.

That same day, Anderson received a telephone call from John Brocato, a representative of Dryades, who requested an extension to June 20, 1998. Anderson claims she informed that based on Bonvillain, Jr.'s inability to comply with the terms of SBA's offer to release the lien for $30,000, and in light of other offers being higher than the Bonvillains', a further extension of the deadline would be unlikely. On June 2, 1998, Anderson received a telephone call from Bonvillain, Sr., who informed her that he had not received SBA's May 26, 1998 letter extending the deadline to

June 5, 1998. Anderson subsequently faxed a copy of the letter to Bonvillain, Sr.

On June 4, 1998, in response to a request from the Bonvillains' counsel, Richard Barker, Anderson agreed to extend the deadline for the last time to June 11, 1998. Her letter also specified that the SBA needed to receive a certified check in the amount of $30,000 by June 11, 1998, for the Bonvillains to obtain a release of the lien. On June 10, 1998, the file was assigned to Joseph C. Charles, Jr., an loan specialist. Charles had a single conversation with Bonvillain, Sr. on that date, in which Bonvillain, Sr. represented that they were still trying to raise the requisite funds for the cash injection.

The June 11, 1998 deadline came and went without the SBA receiving a certified check in the amount of $30,000. A faxed memo addressed to Anderson from America's dated June 11, 1998, indicated that the lender would need fifteen additional working days (until July 2, 1998) to process a loan to James Bonvillain. Charles denied the Bonvillains any further extensions beyond the final deadline of June 11, 1998.

As a result of the aforementioned events, the Bonvillains brought suit against the United States, Anderson, and Hibernia on November 12, 1998 in a action captioned James Bonvillain, Sr. and James , Jr. v. United States of America, et al, No. 98-3369, Div. "J"(1). That matter, "Bonvillain I," was assigned to the Honorable Carl J. Barbier. In Bonvillain I, the Plaintiffs alleged that "Anderson acted in concert, collusion, and conspiracy with others to restrain interstate trade and commerce by preventing and blocking plaintiff's efforts to close and obtain clear title to a fishing boat vessel which was to work in federal waters and was to sell its catch in interstate

commerce." Bonvillain I at 6 (citing Complaint, paragraph XVI). In addition, the Bonvillains claimed that Anderson deprived them of their property without due processor just compensation. Id at 6. The Bonvillains alleged that the United States was liable for Anderson's conduct under the theory of respondeat superior. In an attempt to recover monetary damages and receive injunctive relief, the Bonvillains sought recovery under 28 U.S.C. 1983 and the Federal Tort Claims Act ("FTCA"). The Plaintiffs also alleged that Hibernia, through the negligence of its employee, Ledet, was a cause of the subsequent breach of contract by the SBA and the tortious conduct on the part of its agent, Anderson.

On August 25, 1999, Hibernia and Ledet filed a Motion to Dismiss the Plaintiffs' complaint with prejudice. The Plaintiff's filed an opposition to this motion on November 10, 1999. A Final Judgment was entered on November 30, 1999, granting Hibernia's Motion to Dismiss. Accordingly, all claims against Hibernia were dismissed with prejudice.

Additionally, in Bonvillain I, the United States and Anderson moved for two types of relief. First, the United States successfully moved to substitute itself for Anderson with respect to those allegedly tortious actions in which Anderson had acted in her official capacity. Second, the United States and Anderson moved to dismiss all claims asserted by the Plaintiffs, including those claims arising from Anderson's acting in her individual capacity.

With respect to the claims against Anderson in her official capacity, the Bonvillain I court first held that all claims brought pursuant to U.S.C. 1983 were not actionable against a federal defendant. The court explained that Section 1983 applies only to public officials acting *under color of state law.* Bonvillain I at 10 (citing Resident Council of Allen

Pkwy Village v. Hud, 980 F.2d 1043, 1053 (5th Cir. 1993). Accordingly, because the defendant, Linda Anderson, was not a state actor, those claims asserted against her pursuant to 1983 were dismissed with prejudice. Additionally, the Bonvillain I court found that sovereign immunity bars actions for monetary damages arising under civil rights statues or the Constitution when waiver has not been explicitly made. Bonvillain I. At 12. In its opinion, the court articulated the general rule that a plaintiff must allege conduct by a defendant that rises to the level of a constitutional violation. Bonvillain I at 12. (citing United States v. Stanley, 483 U.S. 669 (1987); Bivens v. Six Unknown Named Federal Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The court found that, even assuming Anderson discussed the potential availability of the F/V Captain Lloyd and "made arrangements in furtherance of her own personal gain" to obtain the fishing boat, given the number of continuances granted to the Bonvillains, no constitutional violation occurred within the meaning of Bivens. See Bonvillain I at 12-13. The court further stated that even if a constitutional violation did occur, the Plaintiffs failed to plead or reply to the Government's motion with sufficient specificity to overcome a defense of qualified immunity. Bonvillain I at 13. (citing Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995). Consequently, on November 30, 1999, Judge Barbier granted the United States' and Linda D. Anderson's Motions to Substitute and to Dismiss, whereby he dismissed with prejudice all claims asserted against Anderson in both her individual and official capacity. However, as they were deemed to be premature because the Plaintiffs failed to exhaust their administrative remedies, all claims brought pursuant to the FTCA were dismissed without prejudice.

On January 14, 2000, the Plaintiffs filed administrative claim with the SBA. The denial of their claim was sent via certified mail on April 27, 2000. The Plaintiffs filed the present action on October 10, 2000 ("Bonvillain II"). The present case, Bonvillain II, involves the same parties (with the exception of Hibernia) and almost all of the same claims that were dismissed by Judge Barbier in Bonvillain I. Consequently, the United States filed the instant Motion to Dismiss in which it contends that the Plaintiffs are attempting to resurrect civil rights and constitutionally based claims that were dismissed with prejudice and are now barred by the doctrine of res judicata and, possibly, the applicable statute of limitations. In addition, the United States maintains that the Plaintiffs' FTCA claims should be dismissed because they are without merit.

II. Law and Analysis:

A. Motions to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure:

With respect to the Plaintiffs' constitutional and civil rights claims against the Defendants, the United States avers that said claims should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Rule 12(b)(1) states that a claim shall be dismissed if this Court lacks jurisdiction over the matter. See Fed. R. Civ. P. 12(b)(1). In the present case, the United States argues that this Court lacks jurisdiction over the constitutional and civil rights claims asserted by the Plaintiffs because said claims are barred by the doctrine of res judicata and/or the applicable statute of limitations.

The rules of res judicata encompass two separate but linked preclusive doctrines: (1) true res

judicata, or claim preclusion, and (2) collateral estoppel, or issue preclusion. See Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1978). The former is typically what is called "res judicata," and it treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." Id at 535. (citing Sea-Land Services, In. v. Gaudet, 1974, 414 U.S. 573, 578 – 79, 94 S.Ct. 806, 39 L.Ed.2d 9, 17 – 18). Res judicata incorporates the doctrines of merger and bar, thereby extending the effect of a judgment to the litigation of all issues relevant to the same claim between the same parties, whether or not those issues were raised at trial. For example, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished and that judgment then acts as a "bar." Id at 535. In contrast, collateral estoppel recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. In order to minimize redundant litigation, collateral estoppel bars the relitigation of issues actually adjudicated, and the essential to the judgment, in a prior litigation between the same parties. Id at 535 – 536. (citing Harris v. Washington, 1971, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212). In the present case, the Defendants argue that claim preclusion, or true res judicata, bars the Plaintiffs from bringing the claims asserted in this action.

The Fifth Circuit's test for determining whether a claim is barred by the doctrine of res judicata, or claim preclusion, has been articulated as follows:

> " 'For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have a final judgment on the merits and the same cause of action must be involved in both cases.'"

Nilsen v. City of Moss Point, Miss., 701 F.2d 556, 559 (5th Cir.1983) (en banc) (quoting Kemp v. Birmingham News Co., 608 F.2d 1049, 1052 (5th Cir. 1979)).

Following these guidelines, this Court is of the opinion that to the extent that the instant action contains claims that were previously adjudicated by Judge Barbier in Bonvillain I, this action shall be dismissed with prejudice because said claims are barred by res judicata. In the present action, the Plaintiffs are asserting claims that are nearly identical to those claims asserted in Bonvillain I. Moreover, the present claims are based on the same facts as alleged in Bonvillain I. The parties are even the same, save that Hibernia is not a defendant to the present action.

The court's order dismissing the Plaintiffs' claims in Bonvillain I stated that "the Bonvillains' claims under 28 U.S.C. 1983 are not actionable against a federal defendant, since Section 1983 applies to public officials acting under color of state law." Bonvillain I at 10. (citing Resident Council of Allen Pkwy. Village v. HUD, 980 F.2d 1043, 1053 (5th Cir. 1993). The court additionally held that "sovereign immunity bars suit for any claims for monetary damages arising under civil rights statutes or the Constitution, when a waiver has not been explicitly made." Bonvillain I at 11. (citing Garcia v. United States, 666 F.2d 960, 966 (5th Cir. 1982); see also Malone v. Bowdoin, 369 U.S. 643, 647 (1972). As stated above, the Plaintiffs' present

claims against Anderson in her official capacity shall be dismissed with prejudice because they are barred by res judicata.

With respect to claims arising against Anderson in her personal capacity, the Bonvillain I at 12. In that case, the court found that "no constitutional violation occurred within the meaning of Bivens." Bonvillain at 12 – 13. (citing United States v. Stanley, 483 U.S. 669 (1987); Bivens v. Six Unknown Named Federal Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Just as with the claims against Anderson in her official capacity, in this case the Plaintiffs have asserted the same claims against Anderson in her personal capacity as stated in Bonvillain I. Furthermore, the present claims are based on the same factual allegations as stated in Bonvillain I. Those claims were adjudicated on the merits by Judge Barbier in Bonvillain I; therefore, the Plaintiffs' present claims against Anderson in her individual capacity are barred by res judicata. Accordingly, those claims shall be dismissed with prejudice.

Moreover, this Court notes that even if the Plaintiffs' claims against Anderson pursuant to Bivens are not barred by res judicata, they would nevertheless be untimely. While 28U.S.C. 1331 provides for federal subject matter jurisdiction in cases filed against federal officers who violate the constitutional rights of others under the Bivens rationale, courts must look to *state law* to determine the applicable statue of limitations. Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983); Laspopoulos v. F.B.I., et al., 884 F.Supp 214 (E.D.La. 1995). Tort actions prescribe after one year in Louisiana under La.Civ.Code art. 3492. Accordingly, the Plaintiffs' claims against Anderson pursuant to Bivens are prescribed because all of the alleged events that form the basis for those claims occurred in 1997 and 1998, greater than one year prior to the filing of the present lawsuit.

In the present action, the only new constitutional claim against the government that Plaintiffs vaguely articulate is one that Anderson's actions "may have been motivated by race."1

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1 The Plaintiffs additionally claim that Anderson intentionally denied them a Veterans' Preference of 85% financing for guaranteed loans available to Veterans. However, in reviewing the Veterans' Handbook the Plaintiffs refer to (Bonvillain II, exhibit 14), the Court finds that Veterans may receive a guarantee of "up to " 85% on a loan. The fact that the Bonvillains were given 75% rather than the maximum of 85% on a loan is not indicative of a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Accordingly, the Plaintiffs' purported claim with regard to Anderson's failure give them 85% financing for their guaranteed loan is without merit.

Bonvillain II, Complaint paragraph XXVI. Specifically, the Plaintiffs allege that Marcus "Voisin, a white male, did not have to obtain ownership interest in the F/V Captain Lloyd to be considered a competing bidder. Whereas, the Bonvillains, black males, contend that said ownership interest was a requirement in their case. They contend that this alleged difference in treatment was motivated by race. Whatever the merits of this claim might be, as Anderson's alleged conduct occurred greater than one year prior to the filing of the instant lawsuit, the Plaintiffs are attempting to adjudicate claims that have prescribed. Accordingly, said discrimination claim against the Defendant shall be dismissed with prejudice, as it is barred by the applicable statute of limitations.

In conclusion, because Judge Barbier has already adjudicated the aforementioned claims against Anderson on the merits and because any other possible constitutional

and/or civil rights claims against Anderson are barred by the applicable statute of limitations, this Court finds that all civil rights and constitutionally based claims asserted in the present suit against Linda D. Anderson are barred by the doctrine of res judicata and / or the applicable statute of limitations. Accordingly, the Plaintiffs' claims against Anderson, in both her official and individual capacity, shall be dismissed with prejudice pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

B. Motion to Dismiss Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure:

A motion to dismiss for failure to state a claim upon which relief can be granted under FRCP 12(b)(6) "is viewed with disfavor and is rarely granted." Lowery v. Texas A&M University System,117 F.3d 242, 247 (5th Cir. 1997); Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, 67F.2d 1045, 1050 (5th Cir. 1982). The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the original complaint must be taken as true. Campbell v. Wells Fargo Bank, 781F.2d 440, 442 (5th Cir. 1980). A district court may not dismiss a complaint under FRCP 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1057); Blackburn v. Marshall,42 F.3d 925, 931 (5th Cir. 1995). The Fifth Circuit defines this strict standard as, whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Lowrey, 117 F.3d at 247

(citing 5 Charles A Wright & Arthur R. Miller, Federal Practice ad procedure 1357, at 601 (1969).

Because all civil rights and constitutionally based claims against both the United States and Anderson are barred by the doctrine of res judicata and / or the applicable statutes of limitations, the only claims capable of surviving are those brought against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. 2671-2680. However, in the instant Motion to Dismiss, the Defendants assert that the Plaintiffs' FTCA cause of action fails to state a claim for which relief can be granted pursuant to the FTCA. Accordingly, the Defendants seek the dismissal of said FTCA claims with prejudice.

The United States, as a sovereign, is immune from suit except to the extent that it has waived its sovereign immunity. FDIC v. Meyer, 510 U.S. 471 (1994); United States v. Mitchell, 463 U.S. 206 (1983); United States v. Orleans, 425 U.S. 807, 813-814 (1976); Advanced Materials, Inc. v. U.S., 955 F.Supp. 58 (E.D. La. 1997). Congress waived the federal government's immunity under limited circumstances by the passage of the FTCA. The FTCA allows parties to bring suit against the federal government only for "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment…" 28 U.S.C. 1346(b) Because the waiver of sovereign immunity is so limited, it must be strictly construed by the courts. Owen v. United States, 935 F.2d 734 (5th Cir. 1991); Levrie v. Department of Army, 810 F.2d 1311, 1314 (5th Cir. 1987).

In the present case, the Plaintiffs assert what is essentially a claim for intentional acts. The Plaintiffs allege that Anderson intentionally used her position with the SBA to circumvent their business plans by soliciting other potential buyers in an attempt to undermine their business venture. They allege that Anderson discussed the potential availability of the F/V Captain Lloyd with her friends and business associates, in furtherance of her own personal gain. In addition, the Plaintiffs believe that Anderson "acted in concert , collusion and conspiracy with others to restrain interstate trade and commerce by preventing and blocking plaintiffs' effort to close and obtain clear title to a fishing [boat] which was to work in federal waters and was to sell its catch in interstate commerce." Bonvillain II, Complaint paragraph XXI.

As mentioned above, the FTCA's waiver of sovereign immunity applies only to negligent acts of government employees. See 28 U.S.C. 1346(b). Sovereign immunity is not waived for intentional acts. See 28 U.S.C. 2675. In Advanced Materials, Inc. v. United States, 955 F.Supp 58, 59(E.D.La. 1997) (citing City Nat. Bank v. United States, 907 F.Supp. 536, 546 n. 9 (5th Cir. 1990); Hassan v. Louisiana Dept. of Transp. & Development, 923 F.Supp. 890, 894-895 (W.D. La 1990). In Advanced Materials, the Plaintiff sought to maintain a lawsuit as a tort action by simply labeling a contract dispute a tort suit. See id. In the present case, the Bonvillains describe conduct of Anderson, that, if taken as true, would certainly be characterized as an intentional acts. The fact that the Plaintiffs mention the word "negligence" in paragraphs XX and XXV of their Complaint does not determine that the complained of conduct is indeed negligence. In fact, the Plaintiffs describe Anderson's alleged conduct as "intentional, willful, wanton, arbitrary and capricious, and done with callous disregard for plaintiffs' rights." Bonvillain II, Complaint paragraph XX. This clearly

alleges intentional misconduct on the part of Anderson; therefore, the aforementioned FTCA claims against the government for the intentional actions of Anderson fail to state a cause of action for which relief can be obtained under the FTCA.

In addition to the intentional act claims brought pursuant to the FTCA, the Plaintiffs also assert that the United States is liable to them via the principle of respondeat superior for an alleged breach of contract by Anderson. As stated above, the FTCA simply does not encompass contract claims. Therefore, the Bonvillains' claim of breach of contract cannot fall under the waiver of sovereign immunity provided by the FTCA. Accordingly, all claims brought by the Plaintiffs pursuant to the FTCA shall be dismissed with prejudice.

The Plaintiffs' Amended Complaint:

On May 18, 2001, the Plaintiffs filed an Amended Complaint for Declaratory Judgment and Damages. In said complaint, the Plaintiffs assert virtually identical claims as brought in both Bonvillain I and Bonvillain II. In response to the Plaintiffs' filing of their Amended Complaint, the United States filed a Motion for Reconsideration, requesting that this Court reconsider allowing the Plaintiffs to amend their complaint.

After thorough review, this Court finds that the Plaintiffs' Amended Complaint adds no new viable claims or pertinent facts to this litigation. In its Motion for Reconsideration, the United States avers that all of the claims asserted by the Plaintiffs in the "Amended Complaint (other than those claims that fall under the FTCA) are barred by the doctrine of res judicata and the applicable statutes of

limitation because of Bonvillain I. This Court agrees. Furthermore, this Court finds that those claims brought in the Amended Complaint are without merit for the same reasons that the FTCA claims contained in the Original Complaint are without merit. Consequently, this Court finds that the Plaintiffs' Amended Complaint fails to state any valid claim for which relief can be granted. Accordingly, all claims asserted by the Plaintiffs in their Amended Complaint shall be dismissed with prejudice. Furthermore, this Court notes that because all claims asserted in the Plaintiffs' Amended Complaint shall be dismissed with prejudice, the United States' Motion for Reconsideration requesting that this Court reconsider allowing the Plaintiffs to amend their Complaint is hereby deemed moot.

III. Conclusion

For the reasons stated above, this Court is of the opinion that the Plaintiffs have failed to state any valid claims for which relief may be granted because all claims brought by the Plaintiffs in both their original complaint and their Amended Complaint are barred either by res judicata or the applicable statute of limitations, or they fail to state valid claims for relief pursuant to the FTCA. Accordingly,

IT IS ORDERED that the Defendants' Motion to Dismiss(Doc. 8) be, and the same is hereby, **GRANTED.**

IT IS FURTHER ORDERED that all claims asserted in the Original Complaint by the Plaintiffs, James Bonvillain, Sr., and James Bonvillain, Jr., against the Defendants, the United States of America on behalf of its agency, the U.S. Small Business Administration, and the

SBA" employee, Linda D. Anderson, be. and the same are hereby, **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that all claims asserted in the Amended Complaint by the Plaintiffs, James Bonvillain, Sr., and James Bonvillain, Jr., against the Defendants, the United States of America on behalf of its agency, the U.S. Small Business Administration, and the SBA's employee, Linda D. Anderson, be, and the same are hereby, **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that the United States' Motion for Reconsideration (Doc. 17) be, and the same is hereby, deemed **MOOT.**

New Orleans, Louisiana, this 11th day of June, 2001.

MINUTE ENTRY
BARBIER, J.
November 24,1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES BONVILLAIN, SR., ET AL	CIVIL ACTION
VERSUS	NO: 98-3369
UNITED STATES OF AMERICA,ET AL	SECTION: J (1)

Before the Court is Federal defendant and Linda Anderson's **Motion to Substitute and to Dismiss, Alternatively, Motion for Summary Judgment** (Rec. Doc. 30) and the defendant Hibernia National Bank and Jerry Ledet's **Motion to Dismiss** (Rec. Doc. 27). Plaintiffs oppose the motions.1 The motions, set for hearing on November 10, 1999, are before the Court on briefs without oral argument.

1 Plaintiff has filed an opposition to only Hibernia's Motion to Dismiss and not the federal defendants' motion. However, plaintiff's counsel has notified the Court by telephone that he does intend to oppose the federal defendant's motion. Because plaintiff's opposition to the federal defendants' motion is untimely, there is merit in the federal defendants' motion, and plaintiffs have expressed their opposition, the Court will address the federal defendants' motion on the merits.

BACKGROUND

On July 31, 1997, James Bonvillain, Sr. and James Bonvillain, Jr., ("Bonvillains") purchased the F/V Captain Lloyd, a vessel which the Bonvillains had hoped to use as a fishing boat to start a fishing business. Complaint V.

However, the F/V Captain Lloyd was subject to an outstanding preferred ship mortgage in favor of the United States Small Business Administration ("SBA") in the amount of $118,000. After negotiations, the SBA through its agent defendant Linda Anderson ("Anderson") agreed to release its lien to the Bonvillains for only $30,000. Complaint I, V, and VI.

In an effort to satisfy the lien and obtain capital to start their business, the Bonvillains negotiated with defendant Hibernia Bank ("Hibernia") through its vice president Jerry Ledet to apply for an ABA loan guaranteeing 75% of a loan in the amount of $150,000. Complaint VII. Furthermore, James Bonvillain, Sr., applied for a separate home equity loan for an additional $40,000. Id. Added to Bonvillain, Sr.'s, infusion of personal cash amounting to $10,000, the Bonvillains hoped to receive loans totaling $200,000 to release the lien and refurbish the boat. Id.

By letter dated November 21, 1997, the SBA notified James Bonvillain Jr. that it would guarantee 75% of the requested $150,000 loan subject to six conditions: (1) He would provide a current financial statement from a CPA; (2) His financial condition would not adversely change prior to loan disbursement; (3) He would need to provide a Tax I.D. number; (4) He would need to provide a copy of a Form DD214 reflecting an Honorable discharge from military service; (5) He would provide evidence that not less than $50,000 had been injected into the business as equity capital; and (6) He would provide a marine survey indicating that the value of F/V Captain Lloyd is at least $184,000. Complaint VIII.

The Bonvillains then met with Hibernia representative Ledet to discuss and finalize the loan agreement. At the meeting, the Bovillains informed Ledet that items 1, 2, 3,and 6 were easily obtainable, if not a formality, and item 4 was a matter of Bonvillain Jr.'s formally applying. As for item 5, the $50,000 cash influx into the business, Bonvillain Sr. and Ledet agreed that Hibernia would extend a separate loan to him for $40,000 that, combined with his $10,000 in savings, would satisfy the cash influx requirement. Complaint IX.

Pursuant to this understanding, Bonvillain Jr. resigned from the military where he had served 12 years and attained the rank of Staff Sergeant. Complaint IX

On January 23, 1998, Hibernia notified Bonvillain Sr. that it refused the application for the mortgage of $40,000. Complaint, X. Without the $40,000 mortgage, Bonvillain Jr. was not able to satisfy the $50,000 cash infusion requirement for the SBA guarantee of the $150,000 loan.

In an effort to seek out alternatives to raise the $40,000, plaintiffs received a number of extensions to June 11, 1998. Complaint XI. Within that time, the Bonvillains cooperated with two lending institutions, Dryades Savings Bank ("Dryades") and America's Mortgage Resource ("America's"), in attempts to raise the necessary funds.

Before the June 11, 1998 deadline, the Bonvillains allege, Dryades attempted to obtain approval from SBA representative Anderson to increase the amount of the guaranteed loan from $150,000 to $160,000. Anderson refused. Next, Dryades attempted to gain Anderson's consent to accept $30,000 as satisfaction for the SBA lien on the F/V Captain Lloyd as previously agreed. Anderson again refused, citing that she had another competing bidder. Complaint, XIII.

On June 11, 1998, the last day of the extended deadline, the Bonvillains arranged for America's to loan them $30,000 in order to release the lien. However, at this time Anderson was on vacation and no one was available to close the deal. The next day another agent of SBA, Ernie Carames ("Carames"), contacted Anderson who told him that she had not received notice of America's willingness to loan the money to satisfy the lien and that the case had been re-assigned to a different SBA agent, Mr. Charles. Mr. Charles then spoke with Carames and informed him that he knew nothing of the Bonvillains' case and that they would need to start the SBA proceedings anew. Complaint, XIV.

As a result, the Bonvillains have brought this action against the United States, Anderson, and Hibernia.

The Bonvillains allege that "Anderon acted in concert, collusion and conspiracy with others to restrain interstate trade and commerce by preventing and blocking plaintiff's efforts to close and obtain clear title to a fishing boat vessel which was to work in federal waters and was to sell its catch in interstate commerce." Complaint, XVI. Furthermore, the Bonvillains claim, Anderson deprived them of their property without due process or just compensation.

As for the federal defendant, the Bonvillains allege that it is liable for Anderson's conduct under the theory of respondeat superior. Moreover, the Bonvillains seek recovery under 28 U.S.C. 1983 and negligence in an attempt to recover money damages and receive injunctive relief. Complaint, XVIII.

As for Hibernia, the Bonvillains allege that the negligence of its employee, Ledet, was a cause of the subsequent breach of contract by SBA and tortious conduct on the part of its agent Anderson.

HIBERNIA'S MOTION TO DISMISS

The Bonvillains' claims against Hibernia arise from Hibernia's assurances surrounding the two loans. The first disputed assurance concerns Hibernia's loan to Bonvillain Jr., where he would receive the $150,000 loan, contingent upon satisfying the SBA requirements.

The second loan concerns the home equity loan to Bonvillain Sr. Because Ledet assured Bonvillain Sr. that it would award him the $40,000 home equity loan, thereby satisfying one of the SBA requirements, Bonvillain Jr. retired after 12 years of service from the military in order to obtain an honorable discharge, satisfying yet another SBA requirement.

In its motion, Hibernia argues that the Bonvillains filled out an application for the loans and, as such, loan applications are not binding contracts. Furthermore, any assurances or promises Ledet may have given the Bonvillains were oral and, under the Louisiana Credit Agreement Statute, LA. REV. STAT. 6:1122, can never be the basis for an action under state law.2

In support of this contention, Hibernia relies upon Fleming Irrigation, Inc. v. Pioneer Bank & Trust Co., 661 So.2d 1035 (La. App. 2d Cir. 1995), for the proposition that all actions for damages arising form oral promises to lend money, even when predicated on different theories of recovery, are barred if not in writing. Id. at 1039.

2 Section 1122 provides: "A debtor shall not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." LA. REV. STAT. 6:1122.

Consequently, Hibernia argues, all claims against Hibernia should be dismissed since there was no written agreement, only an application, and any oral assurances or promises by Ledet to the Bonvillains are precluded as forming a basis for recovery under Louisiana law.

In their opposition, the Bonvillains concede that no written document exist but argue that grounds for relief lie in the alleged oral representation further[ing] the conspiracy to deprive the Bonvillains of their property without due process of law." Opposition, at 3. The Bonvillains frame the issue as "whether the facts alleged by the Bonvillains in their pleading will constitute [sic] causes of action outside the scope of the credit agreement, whether one existed or not." **Id.**

ANALYSIS

The plain language of the Louisiana Credit Agreement Statute ("ACT"") requires that for a cause of action to be maintained arising form a credit agreement it must be in writing. LA. REV. STAT. 6:1122. Further, any agreement between the Bonvillains and Hibernia would have qualified as a "credit agreement" under the Act because the Bonvillains sought a loan and a mortgage which qualify as "an agreement to lend or forbear repayment of money or goods or to otherwise extend credit, or make any other financial accommodation," LA. REV. STAT. 6:1121 (1). The Fleming Court came to the identical conclusion: no action may be maintained against a "financial institution" under Louisiana law unless there is a writing.3 Fleming Irrigation, 661 So.2d at 1039.

The Court recognizes that the Louisiana Supreme Court in Whitney National Bank v. Rockwell, 661 So.2d 1325

3 (La. 1995), expressly refused to adopt Fleming's blanket rule that "the credit card agreement statute precludes all actions for damages arising from oral credit agreements, regardless of the theory of recovery asserted." Id. at 1332 n.6. Nonetheless, Rockwell's holding, granting summary judgment in favor of Whitney where no written instrument existed, is consistent with both Fleming and the Act, namely, that a cause of action will not lie for oral promises if no written credit agreement exists.

FEDERAL DEFENDANT'S MOTION TO SUBSTITUTE AND TO DISMISS, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

In its motion, the federal defendant and Anderson move the Court for two types of relief. First, the United States moves to substitute itself for Anderson for those alleged tortious actions in which Anderson acted in her official capacity. Second, the United States and Anderson move to dismiss all claims, including those claims arising from Anderson acting in her individual capacity.

For purposes of substituting parties, the Government relies upon 18 U.S.C. 2679(b)(1) which provides that the proper party defendant in an action against a federal employee for injury or loss of property, where the employee was acting in an official capacity, is the United States.

The Court finds that section 2679(b)(1) does in fact require Anderson to be replaced by the United States for those alleged tortious acts arising from Anderson acting in her official capacity.

For purposes of dismissing the claims against the United States and Anderson in her official capacity, the

Government argues that the Bonvillains claims are premature.

First, the Bonvillains' claims under 28 U.S.C. 1983 are not actionable against a federal defendant, since Section 1983 applies to public officials acting under color of state law. See Resident Council of Allen Pwky. Village v. HUD, 980 f.2D 1043, 1053 (5TH Cir. 1993).

Second, sovereign immunity bars suit for any claims monetary damages arising under civil rights statutes or the Constitution, when waiver has not been explicitly made. Garcia v. United States, 666 F.2d 960, 966 (5TH Cir. 1982); see also Malone v. Bowdoin, 369 U.S. 643, 647 (1972).

Finally, the only claims left for the Bonvillains are under the Federal Tort Claims Act ("FTCA"), and such claims are premature. To proceed under FTCA against the United States, plaintiff must first exhaust administrative remedies. 28 U.S.C. 2675(a). To proceed under FTCA against the United States, plaintiff must first exhaust administrative remedies requirement is jurisdictional in nature and mandates that a plaintiff must first present a claim to the appropriate federal agency. See Commercial Union Ins. Co. v. United States,1998 WL 637379, at *5 (E.D. La. September 16, 1998).

In this case, the Bonvillains have not proven that they have exhausted administrative remedies. Taking the Bonvillain's Complaint as true for purposes of this motion, the Bonvillains state that they "contemporaneously with the filing of this suit, instituted a claim for administrative relief before the SBA." Complaint, XXIV. As such, the administrative remedies have not been exhausted under Section 2675. Furthermore, the Complaint pursuant to the Federal Tort Claims Act at this time." Complaint, XXIV.

ANDERSON IN HER PERSONAL CAPACITY

Lastly, the federal defendants move the Court to dismiss all claims against Anderson in her individual capacity, arguing that Anderson's conduct does not rise to the level of a constitutional violation. The Court agrees.

For the Bonvillains to maintain an action against Anderson, a federal employee, in her individual capacity, they must allege that her conduct rises to the level of a constitutional violation. See United States v. Stanley, 483 U.S. 669 (1987); Bivens v. Six Unknown Named Federal Agent of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Even assuming that Anderson discussed the potential availability of the F/V Captain Lloyd and "made arrangements in furtherance of her own personal gain," Complaint, XV, to obtain the fishing boat, given the number of continuances granted to the Bonvillains, the Court finds that no constitutional violation occurred within the meaning of Bivens.

Assuming still further that such a constitutional did occur, the Bonvillains have failed to plead or reply to the Government's motion with sufficient specificity to overcome a defense of qualified immunity. See Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995).

Accordingly,

IT IS ORDERED THAT Hibernia National Bank and Jerry Ledet's Motion to Dismiss should be and is hereby **GRANTED** and all claims against them in the above captioned matter are **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that the United States and Linda Anderson's Motion to Substitute and to Dismiss should be and is hereby **GRANTED** and all claims against them in the above captioned matter are **DISMISSED WITHOUT PREJUDICE.**